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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1933.

No. 62.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,
Petitioners,
vs.
RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

No. 63.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,
Petitioners,
vs.
RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

BRIEF FOR RESPONDENT BANKERS TRUST COMPANY, AS TRUSTEE.

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BRIEF FOR RESPONDENT BANKERS TRUST COMPANY, AS TRUSTEE.

Preliminary Statement.

Bankers Trust Company is trustee under an indenture, dated August 1, 1927, executed by the defendant company to secure an issue of debentures, $10,673,000 of which are outstanding (R. 108). More than $10,188,500 principal amount of the outstanding debentures are deposited with the Respondent Reorganization Committee (R. 293). As such trustee, Respondent intervened as party plaintiff in the receivership in the District Court and prayed for the sale of

the assets of defendant company (R. 85-92), presenting for that purpose a decree of sale which, with modifications by the District Court, was entered May 31, 1932 (R. 283).

Petitioners in their brief attack the procedure in this case upon several grounds, among which are the following which directly concern this Respondent:

1. It is maintained that the District Court erred in entering the decree of sale in the form in which it was entered, in that the decree permitted the sale of all the assets of the defendant company as an entirety, including cash, Liberty Bonds and accounts receivable.

2. It is maintained that the District Court erred in failing to fix a substantially higher upset price than that which was fixed in the decree and thus that the price paid for the assets was inadequate.

POINT I.

The decree of sale fully protected the rights of Petitioners and all other non-assenting creditors.

Apart from their discussion of the adequacy of the price paid at the sale, Petitioners contend, briefly, that a small minority of the creditors of the defendant company are entitled to have its assets liquidated rather than purchased as an entirety, upon the speculative chance that such procedure would realize for the creditors a larger return.

Whether or not cash, Liberty Bonds and receivables should or should not have been sold in conjunction with other corporate assets is in the instant case of academic concern. For more than 96% of the creditors are adherents of the Reorganization Plan, under which the corporate assets have been acquired. If they were to be sold, the Court would not permit their purchase at less than their fair value. If they were not sold and reorganization takes place, the major por-

tion of their proceeds will be distributed to the reorganized company, which represents the overwhelming majority of creditors, and the distribution to non-assenting creditors will not be substantially affected one way or the other.

Petitioners apparently contend, however, that the minority is entitled to require that each parcel of property owned by the defendant corporation should have been offered for sale separately without reference to the balance of the properties, upon the theory that the existence under the decree of an opportunity to purchase the properties as an entirety must necessarily chill the bidding for individual parcels. We submit that the opposite is the case. The decree of sale provided, as is the established practice, that the property must be offered in individual parcels and that the bid for the entirety, to be acceptable, must exceed the sum of the bids for such individual parcels. This case is not one of the sale of farm lots where the purchasers would necessarily be local people who could not afford to travel to a sale. It was an offering of a large industrial property of specialized nature, and it is submitted that the District Court would have committed grievous error had it not, through permitting bidding for the entirety, given an opportunity for the purchase of the entire operatable concern.

We think it is self evident that a purchaser desiring to buy the entire concern could not reasonably be asked to take his chances upon the amount which he would have to pay in competitive bidding for each individual plant, at sales held upon successive days or simultaneously, without knowing what the total of his bid must be in order to purchase an operatable entirety. The existence of the danger, without a provision for sale as an entirety, that he could not calculate the total amount he would be called upon to spend in order to purchase an operatable entirety would be an even greater factor chilling the bidding, than is the requirement that a bidder for an individual property must remain in suspense as to whether or not he can successfully purchase it until it is determined whether or not a bid for the entirety exceeds the sum of the individual bids.

The contention of the Petitioners might have some force had they produced at the hearing upon confirmation of sale one scintilla of evidence that bidders for any of the individual parcels existed. They did not produce such evidence, presumably because they could not, and we submit that it does not exist.

POINT II.

The upset price in the decree was fixed upon adequate evidence; and the bid price was adequate in all the circumstances.

Petitioners' attack upon the procedure with respect to price may be summed up as follows: The Court, being in possession of the assets of the defendant corporation, must treat them as a trust fund and must therefore fix an upset price which must in some way represent the fair value of the properties to be sold.

As we conceive it, such is not nor has it ever been the law. This Court has not expressed itself, so far as we have been able to determine, upon the question of the necessity of an upset price as an element of a judicial sale, whether or not it is known in advance that an offer to purchase pursuant to a reorganization plan will be made. The fixing of an upset price is but a device to save the delay and expense of resale in the event of an inadequate bid. Circuit Courts of Appeals have universally held that whether or not an upset price is fixed is entirely discretionary with the Court. The most recent decision to this effect is that of the Second Circuit Court of Appeals, in *Bethlehem Steel Co.* v. *International Combustion Engineering Corp.*, 66 Fed. (2d) 409.

The historical development of the upset price has been a gradual process. It probably began with the fixing of a sum equal to the expenses of sale and the amount of prior liens, so that the Court might be assured that its debts, receivers' certificates and the like would be paid. *Blair* v. *St. Louis, H. & K. R. Co.*, 25 Fed. 232 (C. C. E. D. Mo., 1885).

The next step was to assess the earning power of the properties. *Central Trust Co.* v. *Washington County R. Co.*, 124 Fed. 813 (C. C. D. Me., 1903). This development is sketched in Weiner: *Conflicting Functions of the Upset Price in a Corporate Reorganization*, 27 Col. L. Rev. 132 *et seq.*, at 140.

In later railroad cases, evidence has been received as to the market value of the reorganization securities. Weiner, *op. cit.*, page 141.

Fundamentally these are the same considerations which must guide the District Court in reaching a determination that the bid price was fair. Of course that determination must be reached upon the best available evidence and upon an adequate showing. We submit that such was plainly the case here.

The upset price included in the decree of sale in this case was determined upon by the Court after a hearing lasting three days (R. 133 to 267), at which witness after witness testified and was cross examined by Petitioner's counsel upon such questions as estimated value of the properties, earning capacity, market value of the debentures, the amount of cash and Liberty Bonds on hand, the value of accounts receivable, and the like. There was a further day given to legal argument (R. 269).

Petitioners seek refuge in this Court's *dictum* in the case of *National Surety Co.* v. *Coriell*, 289 U. S. 426, and lay great stress upon the contention that the District Court did not have before it an "independent" appraisal of the properties to be sold. Apparently it is their interpretation of the decision in that case that such appraisal is a *sine qua non* of an adequate finding as to upset price. We submit that this Court did not and will not so hold. In the *National Surety Company* case there was no judicial sale at auction with bidding open to all the world. Nor was there *any* evidence to support the District Court's decree. Petitioners have seized upon and attempted to isolate a single element which this Court listed as one of those which *might* have been offered as evidence in support of the decree. We think it is

manifest that the evidence produced at the hearing in this case upon the fixing of the upset price comprised a careful appraisal by those most familiar with the properties with the fullest opportunity for the minority to be heard and to examine. In addition testimony was taken at length (for two whole court days) upon the hearing before the District Court upon the motion to confirm the sale and thus the action by the District Court in confirming the sale was taken not only with evidence as to a fair upset price but with evidence of adequacy of the actual sales price.

We submit that this Court should not and will not make a rule of thumb as to the elements required in *every* case to ground a finding that a particular price is adequate and fair under the circumstances, but will leave to the sound discretion of the District Court the determination of what evidence the circumstances require, and upon such evidence the lowest reasonable figure at which the Court, in fairness to the minority will permit the majority to purchase the assets. The record here shows that the District Court exercised a sound discretion upon proper evidence and with full opportunity to all parties to be heard and to examine.

The decrees should be affirmed in all respects.

Respectfully submitted,

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